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# Adjudication of Things Past: Reflections on History as Evidence

by  
DANIEL A. FARBER\*

We cannot invent our facts. Either Elvis Presley is dead or he isn't.  
—Eric Hobsbawm<sup>1</sup>

"*Evidence*, like *clue* or *proof*, is a crucial word for the historian and the judge."<sup>2</sup> So we are told by Carlo Ginzburg, a leading historiographer who has traced comparisons between the roles of the judge and historian over the past two centuries. Today, he advises us, words like proof and truth have acquired an unfashionable ring in the social sciences.<sup>3</sup> But skepticism about these concepts has not yet become universal. Despite an awareness that historical perspectives themselves change over time, Ginzburg himself is not prepared to abandon the concept of truth. He analogizes the shifting perspectives of historians to linguistic change: "[n]either the past and future developments of the language we speak, nor the existence of other lan-

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1. Eric Hobsbawm, *The New Threat to History*, N.Y. REV. BOOKS, Dec. 16, 1993, at 62-63.

2. Carlo Ginzburg, *Checking the Evidence: The Judge and the Historian*, in JAMES CHANDLER ET AL., QUESTIONS OF EVIDENCE: PROOF, PRACTICE, AND PERSUASION ACROSS THE DISCIPLINES 290 (1994) [hereinafter QUESTIONS OF EVIDENCE]. For recent discussions of this comparison by legal scholars, see Ronald Allen, *The Nature of Juridical Proof*, 13 CARDOZO L. REV. 373, 387-91 (1991); WILLIAM TWINING, RETHINKING EVIDENCE: EXPLORATORY ESSAYS 71-81 (1990).

3. See Ginzburg, *supra* note 2, at 294.

guages, affect our commitment to the language we speak or its grip over reality.”<sup>4</sup> But Ginzburg is considered suspect in many quarters. As a defender of evidence, truth, and proof, he is said to be “just a conservative positivist.”<sup>5</sup> That criticism was sparked by Ginzburg’s view that Holocaust denial is flatly false, not merely a politically ineffectual version of the world.<sup>6</sup>

The implication of such debates for the legal process has not gone unnoticed. As Mirjan Damaška has pointed out, trials have conventionally been considered a form of inquiry into past events, with the underlying assumption of “some kind of correlation between our statements about the world and the world itself.”<sup>7</sup> But “[i]nfluential currents of contemporary thought posit a radical disjunction of language from external reference: to ascribe to words the capacity to represent reality—no matter how constructed—is branded a vulgar illusion.”<sup>8</sup> Yet, he observes, “[w]here ‘the covenant between word and world’ is broken, it makes no sense to worry about accuracy in fact-finding or about judgments that fail to reflect the truth.”<sup>9</sup> Postmodernism, then, puts into question the entire function of the trial as traditionally understood.

However their tasks may differ,<sup>10</sup> both the judge and the historian have traditionally defined their roles on the basis of concepts like evidence, proof, and truth. Whatever else may be said on the subject, these concepts can no longer be taken for granted. Distinctions between objectivity and ideology, and between advocacy and scholarship, are now highly contested and problematic. It would be presumptuous to attempt to resolve such fundamental issues in this essay. Instead, my goal is to investigate the relationship between this dispute and historical and judicial practice. To provide concreteness to this inquiry, I will take as a point of departure the literal intersection between law and history that occurs when historians enter the

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4. *Id.* at 303.

5. Arnold I. Davidson, *Carlo Ginzburg and the Renewal of Historiography*, in QUESTIONS OF EVIDENCE, *supra* note 2, at 311. Davidson reports, but does not share, Ginzburg’s view.

6. *Id.* at 309-11.

7. MIRJAN R. DAMAŠKA, EVIDENCE LAW ADRIFT 94 (1997).

8. *Id.*

9. *Id.* at 95.

10. For a discussion of some of the differences, see Henry Hart & John McNaughton, *Evidence and Inference in the Law*, in EVIDENCE AND INFERENCE 50-59 (Daniel Lerner ed., 1959). Some resemblances between the two tasks are discussed by Judge Frank in *In re Fried*, 161 F.2d 453, 462-63 (2d Cir. 1947).

legal arena to testify as expert witnesses. It bears emphasis, however, that the situation of the historian witness is being used for illustrative purposes; this is not fundamentally a paper about the law pertaining to expert witnesses.

The essay begins by recounting the experiences of historians as expert witnesses in some notable recent cases.<sup>11</sup> The historian's claim to be heard is based on expertise, which presumably means heightened access to the kind of truth sought in the trial process. Rather than being accepted as objective, however, the testimony is often prone to be attacked as politically slanted, as we will see in Part I. Part II surveys challenges to the politics/scholarship distinction, or in other words, the arguments against Ginzburg's effort to keep truth, proof, and evidence in circulation as valid intellectual currency. These challenges are associated with postmodernism generally, and in particular with feminist and multiculturalist perspectives on history and law. Part III argues, however, that abandoning objectivity as a social ideal would entail serious losses both in law and in history.

This essay covers some seemingly disparate topics: recent controversies over testimony by historians in politically charged cases; postmodern theories in law; the "objectivity question" in history; and efforts to make catharsis or public education, rather than truth-seeking, central to the trial process. The common thread, however, is the question of fidelity to the past.<sup>12</sup> The historian's fidelity is threatened by the pressures of trial. The postmodern legal scholar and the relativist historian question the very possibility of keeping faith with the past. The evidence law revisionist wants to replace historic truth with some more present-oriented goal. Although seeking the truth about the past is often more complex and sometimes more disturbing than we like to admit, it is a search we cannot afford to abandon.

## I. Historians in Court

An expert witness is always under pressure to simplify and recast her views for advocacy purposes. The deeper question confronted by

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11. A related development is the use of social science findings in judicial opinions. See David Faigman, "Normative Constitutional Fact-Finding": *Exploring the Empirical Component of Constitutional Interpretation*, 139 U. PA. L. REV. 541 (1991).

12. The concept of creative fidelity to the past has recently gained attention in constitutional theory. See, e.g., Symposium, *Fidelity in Constitutional Theory*, 65 FORDHAM L. REV. 1247 (1997); Lawrence Lessig, *Translating Federalism: United States v. Lopez*, 1995 SUP. CT. REV. 125.

the historian is the extent to which these pressures are really distinguishable from the professional and ideological pressures operating in her "normal" professional life. By putting the historian's professional role under stress, the courtroom highlights some of the tensions internal to that role.

The role of historians as expert witnesses is illustrated by a recent case from Minnesota involving Native American hunting and fishing rights.<sup>13</sup> An 1837 treaty provided that hunting and fishing rights were "guaranteed to the Indians, during the pleasure of the President of the United States."<sup>14</sup> A later presidential order purported to revoke these rights. The Chippewa argued that the 1837 treaty should be interpreted to allow revocation only for misconduct, which is how they contended the Native Americans who signed the treaty would have understood it. Other issues in the case involved the implementation of the treaty during the nineteenth century.

The critical role played by historians in the trial can best be seen in the trial judge's summary of the evidence. She relied heavily on the plaintiff's five expert witnesses,<sup>15</sup> and the defense also called five similar experts, including a specialist in Minnesota history and a specialist on the role of railroads in western expansion. Thirty pages of the court's opinion in the Chippewa case are devoted to historical findings. The expert witnesses played a crucial role in the critical finding:

Dodge [the government negotiator] did not explain the phrase "at the pleasure of the President" to the Chippewa, and the testimony of Dr. Nichols established that the Chippewa would not have understood "at the pleasure of the President" to give him unrestricted discretion. The State argues that the traders, half-breeds, and missionaries at the treaty negotiations would have supplemented the official translations and ensured that the Chippewa understood all of the provisions of the treaty. Dr. Cleland testified persuasively, however, that all of these groups had their own interests to protect and that those interests were not identical with the interests of the

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13. *Mille Lacs Band of Chippewa Indians v. Minnesota*, 861 F. Supp. 784 (D. Minn. 1994), *aff'd* 124 F.3d 904 (8th Cir. 1997). For some other examples of the use of historians as expert witnesses in litigation involving Native American treaty rights, see *Pueblo de Zia v. United States*, 165 Ct. Cl. 501 (1964); *Pueblo of Santa Ana v. Baca*, 844 F.2d 708, 710-12 (10th Cir. 1988); *United States v. Dupris*, 612 F.2d 319, 338-39 (8th Cir. 1979).

14. *Cited in Mille Lacs Band*, 861 F. Supp. at 789.

15. *Id.*

Chippewa.<sup>16</sup>

Hence, the court concluded, the revocation of the 1837 treaty was ineffective, the fishing and hunting rights of the tribe remained intact, and the state government was not entitled to regulate them.<sup>17</sup>

### A. The Historian as Expert Witness

As the Chippewa case illustrates, there is a growing trend in American trials toward the widespread use of expert witnesses on a wide range of issues, including historical matters. The use of historians as expert witnesses is not unusual today in several categories of cases, such as those involving deportation of alleged Holocaust participants<sup>18</sup> and those involving claims of discriminatory intent under the Voting Rights Act.<sup>19</sup>

Although the Chippewa case was locally controversial, it did not directly involve any major issue of national social policy. As we will see, historians have also been involved in litigation involving some of the leading social issues of our day, particularly issues relating to gender and sexuality. Those cases dramatize the challenges to the historian's claim to offer the court a source of reliable, objective evidence.

### B. Ideology and Professionalism: Discrimination Law

The dispute over objectivity arose in vivid form in a recent challenge to a state constitutional amendment negating gay rights.<sup>20</sup> One peripheral question was the extent to which anti-homosexual norms are embedded in our cultural traditions, and particularly the extent to

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16. *Id.* at 827. Nichols was a linguist, while Cleland was an ethnohistorian. *See id.* at 790.

17. *See id.* at 838-39, 841.

18. *See, e.g.*, *Kalejs v. INS*, 10 F.3d 441, 443 (7th Cir. 1993); *United States v. Dailide*, 953 F. Supp. 192, 196 n.4 (N.D. Ohio 1997); *United States v. Lileikis*, 929 F. Supp. 31, 37 (D. Mass. 1996); *United States v. Koziy*, 540 F. Supp. 25, 27 (S.D. Fla. 1982); *United States v. Linnas*, 527 F. Supp. 426, 430 (E.D.N.Y. 1981).

19. *See, e.g.*, *Hunter v. Underwood*, 471 U.S. 222, 229 (1985); *NAACP v. City of Niagara Falls*, 65 F.3d 1002, 1020 (2d Cir. 1995); *Irby v. Fitz-Hugh*, 692 F. Supp. 610, 613 (E.D. Va. 1988). *See also* J. Morgan Kousser, *Expert Witnesses, Rational Choice and the Search for Intent*, 5 CONST. COMM. 349 (1988). If the evidence is solely addressed to a discussion of past social developments, it need not be presented in the form of oral testimony, but as we will see, this is not uncommon.

20. *Romer v. Evans*, 116 S. Ct. 1620 (1996).

which they are severable from Christian theology. Professor Martha Nussbaum testified at trial about the classical Greek view on the subject, focusing on Plato.<sup>21</sup> She became locked in a fierce dispute with another expert witness, John Finnis, over the meaning of some critical passages from Plato. In particular, the two crossed swords over whether a particular Greek phrase is best translated as "those who first ventured to do this" or "those who were first guilty of such enormities," with the difference turning on the meaning of a single Greek word.<sup>22</sup>

This dispute fortunately did not turn out to be relevant to the Supreme Court's decision, but what it lacked in legal significance it made up for in contentiousness. Both combatants later published articles on the subject. A couple of selected sentences will communicate the flavor of Finnis's comments: "Not surprisingly, the falsification to which the works of Dover, Vlastos, and Price were subjected was extended to some of Professor Nussbaum's own earlier writings."<sup>23</sup> And the following:

So Professor Nussbaum put a dictionary before the court precisely as 'the authoritative dictionary relied on by all scholars in this area,' but the quotation that, she said, was from that dictionary is in fact from one that is not authoritative or relied upon by all scholars, or indeed any scholars.<sup>24</sup>

In conclusion, Finnis said, Nussbaum's testimony was "a wholesale abuse of her scholarly authority and attainments."<sup>25</sup>

Nussbaum also published an article on the subject of her testimony, but adopted the more constructive strategy of burying her opponent in citations rather than invective. Although her rhetoric was more restrained than Finnis's, she added an entire appendix disputing his views, another appendix about tools of classical scholarship at least partly devoted to attacking his choice of dictionaries,<sup>26</sup> and yet another suggesting strategies for lawyers to prove the incompetence of opposing experts. Indeed, she described Finnis's views as the focal point of this 130 page article.<sup>27</sup> Although she stopped short of draw-

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21. See Martha Nussbaum, *Platonic Love and Colorado Law: The Relevance of Ancient Greek Norms to Modern Sexual Controversies*, 80 VA. L. REV. 1515, 1518 (1994).

22. John Finnis, "Shameless Acts" in *Colorado: Abuse of Scholarship in Constitutional Cases*, ACAD. QUESTIONS, Fall 1994, at 10, 23.

23. *Id.* at 31.

24. *Id.* at 25-26.

25. *Id.* at 35.

26. Nussbaum, *supra* note 21, at 1620-22.

27. *Id.* at 1554.

ing the connection, she emphasized aspects of Finnis's views that correspond with Catholic doctrine,<sup>28</sup> leaving the implication that his historical interpretations were distorted by his Christian religious commitments, as she believed Western attitudes toward homosexuals generally have been distorted.

The Finnis/Nussbaum dispute pales in comparison to the clash in an earlier discrimination case, *EEOC v. Sears, Roebuck & Co.*<sup>29</sup> There, the clash had expanded beyond two conflicting historians to embrace a significant segment of the historical profession itself. *Sears* was a massive sex discrimination case, in which the government had relied entirely on statistical evidence to demonstrate widespread intentional discrimination against women. Sears argued that because the jobs in question involved job stress and financial risk, women were less likely to apply, thus explaining any statistical disparity in hiring.<sup>30</sup> In support of this theory, Sears called Rosalind Rosenberg to testify about the history of women's attitudes toward the workplace.<sup>31</sup>

Rosenberg testified that traditionally women have been socialized not to seek risky or stressful employment such as that involved in the case. The government responded with the testimony of another women's historian, Alice Kessler-Harris.<sup>32</sup> She testified that any disparity in hiring was probably due to discrimination by Sears rather than any gender difference in job interests; her testimony seemed somewhat at odds, however, with some previous writings about women in the workplace.<sup>33</sup> As she reported later, Kessler-Harris was particularly offended by Rosenberg's rebuttal testimony:

Rosenberg attacked my credibility (on which she had earlier relied in her own testimony) by claiming that what I said on the stand contradicted my own published work. She did so by suggesting that my

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28. *Id.* at 1525-29. See esp. *id.* at 1527 n.37.

29. 839 F.2d 302 (7th Cir. 1988).

30. For an explanation of the statistical issues, see Thomas Haskell & Sanford Levinson, *Academic Freedom and Expert Witnessing: Historians and the Sears Case*, 66 TEX. L. REV. 1620, 1636-48 (1988).

31. Rosenberg has been called the author of the most original and sophisticated historical work on women's culture. See PETER NOVICK, *THAT NOBLE DREAM: THE "OBJECTIVITY QUESTION" AND THE AMERICAN HISTORICAL PROFESSION* 500-01 (1988).

32. Her perspective on the case can be found in Alice Kessler-Harris, *Academic Freedom and Expert Witnessing: A Response to Haskell and Levinson*, 67 TEX. L. REV. 429 (1988).

33. See NOVICK, *supra* note 31, at 504.



testimony was infused with a particular political perspective and by citing selective examples from my work that purported to demonstrate contradictions between the two bodies of material.<sup>34</sup>

Seemingly sharing Kessler-Harris's reaction, the leading American academic journal of feminism published an "archive" on the case that deleted Rosenberg's rebuttal.<sup>35</sup>

Although the judge credited Rosenberg's testimony, professional reaction against her was swift and devastating. At a meeting of 150 feminist scholars at Columbia, no one defended her against charges of attacking working women and undermining sexual equality.<sup>36</sup> A committee of female historians passed a resolution declaring that "as feminist scholars we have a responsibility not to allow our scholarship to be used against the interests of women struggling for equity in our society."<sup>37</sup> The entire controversy seemed designed, according to two liberal commentators, "to insure that no other historian, especially one without tenure, ever will dare to express similar views in court or in any other forum."<sup>38</sup>

The *Sears* case raises important questions about the relationship between historical scholarship and politics. The crux of the attack on Rosenberg was that her testimony was politically harmful, and by implication, politically motivated, while her defenders charged that it was the attackers who were politically motivated. This dispute certainly highlighted, though it did little to answer, the question of how (or whether) ideological advocacy can be distinguished from scholarship.

As one commentator observes,<sup>39</sup> something of a reprise of the *Sears* litigation took place in *United States v. Virginia*.<sup>40</sup> The issue in that case was whether the state could create a girls' school as a remedy for having excluded them from a military academy, or whether the only permissible remedy was to make the existing academy coed.<sup>41</sup> One of the state's primary witnesses was Elizabeth Fox-

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34. Kessler-Harris, *supra* note 32, at 430.

35. See Haskell & Levinson, *supra* note 30, at 1636.

36. See NOVICK, *supra* note 31, at 509.

37. See Haskell & Levinson, *supra* note 30, at 1631.

38. *Id.* at 1630.

39. See Diane Avery, *Institutional Myths, Historical Narratives and Social Science Evidence: Reading the "Record" in the Virginia Military Institute Case*, 5 SO. CAL. REV. L. & WOMEN'S STUD. 189, 290 (1996).

40. 518 U.S. 515 (1996).

41. *Id.* at 547-51.

Genovese, a leading feminist historian, who testified that gender-based differences in learning styles favored the use of single-sex education in this setting.<sup>42</sup> Fox-Genovese had previously commented that Rosenberg's testimony in *Sears* was "wonderfully revealing" because it had followed certain feminist premises to their logical conclusion.<sup>43</sup> Unlike Rosenberg, however, Fox-Genovese seemingly avoided the ire of her fellow feminists. Perhaps the reason was that the issue was not whether discrimination took place but rather the appropriate remedy—an issue described by one feminist commentator as one "about which feminists and legal scholars *reasonably* could and did disagree."<sup>44</sup> While crediting her testimony, the trial judge was skeptical of the testimony of the government's expert witnesses, whose "personal beliefs in a political and legal notion of equality that discounted the significance of gender differences . . . was used to discredit their testimony about their specific research findings and to question the reliability of their professional judgment generally."<sup>45</sup> Thus, the issue of advocacy versus scholarship surfaced again, though in milder form.

### C. Advocacy and Scholarship: Abortion Law

A feminist historian at Stanford, who was asked to contribute to a pro-choice brief in an abortion case, reported "a small but nagging fear" stemming from the chilling effect of the *Sears* case.<sup>46</sup> Nevertheless, along with 280 other historians, she signed the brief.<sup>47</sup> The thrust of this amicus brief was that historically, abortion was forbidden only for medical reasons rather than protection of the fetus.

The Stanford historian's fears would not have been assuaged if she had known the reactions of John Finnis, Nussbaum's antagonist in the gay rights case. Finnis was no more complimentary toward the abortion brief than he had been to Nussbaum's testimony. In particular, Finnis was harshly critical of James Mohr, whose historical research provided the foundation of the brief. According to Finnis, Mohr's book on the subject "squarely contradicts" the conclusion in

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42. See Avery, *supra* note 39, at 277, 282.

43. See *id.* at 282.

44. *Id.* at 283.

45. *Id.* at 280.

46. Estelle B. Freedman, *Historical Interpretation and Legal Advocacy: Rethinking the Webster Amicus Brief*, PUB. HISTORIAN, Summer 1990, at 27.

47. The brief is reprinted at PUB. HISTORIAN, Summer 1990, at 57.

the brief; in subscribing to the brief, Mohr was "grossly misrepresenting his own scholarly findings."<sup>48</sup> For instance, Finnis quotes Mohr's earlier work as saying that much of the support for abortion restrictions originally came from doctors, who defended the value of human life as an absolute: "And once they had decided that human life was present to some extent in a newly fertilized ovum, however limited that extent might be, they became the fierce opponents of any attack upon it."<sup>49</sup> Yet the amicus brief portrayed the motivation of the doctors as unrelated to fetal protection. In short, Finnis writes, "the production of and submission of the Brief was, in my opinion, a fraud on the Court and the nation."<sup>50</sup>

Some of Finnis's concerns were actually shared to an extent by those who had drafted and signed the brief. For example, they were troubled by the brief's failure to mention the fact that many nineteenth-century feminists opposed abortion.<sup>51</sup> Mohr himself seems to have been particularly concerned about the gap between the brief and his own conception of scholarship:

In contrast to lawyers, most historians, at least the ones whom I have most admired, try to explore as many aspects of their subject as they can, even where they have clear assumptions upon which they work, overt axes to grind, and open political agendas. They take complexity, ambiguity and paradox as givens and they tease from the past those interpretations that seem compelling to them in the present; but unlike the lawyer, the historians I have most admired take seriously and openly into account alternative explanations, mixed motives, and inconvenient facts.<sup>52</sup>

Although he signed the brief because it was closer to his view of history than the historical arguments of the other side, Mohr considered it be a "legal argument based on historical evidence. Ultimately, it was a political document."<sup>53</sup> He did not "ultimately consider the brief to be history, as I understand that craft."<sup>54</sup>

In a thoughtful commentary addressing Mohr's concerns, two of

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48. Finnis, *supra* note 22, at 13.

49. *Id.* at 17.

50. *Id.* at 18. The traditions of British understatement and Oxford urbanity have not, one gathers, survived into the post-Thatcher era.

51. See Jane E. Larson & Clyde Spillenger, "That's Not History": *The Boundaries of Advocacy and Scholarship*, 12 PUB. HISTORIAN 33, 39 (Summer 1990).

52. James C. Mohr, *Historically Based Legal Briefs: Observations of a Participant in the Webster Process*, 12 PUB. HISTORIAN 19, 21-22 (Summer 1990).

53. *Id.* at 25.

54. *Id.*

the brief's drafters questioned the distinction between advocacy and scholarship. "To rest one's criticism of a work solely on the claim that it is 'partisan' or 'ideological' or 'advocative' is to remain innocent of social theories of knowledge."<sup>55</sup> In the drafters' view, any claim of true objectivity or neutrality was suspect, because all knowledge is socially shaped and therefore political. They concluded that the "distinction between advocative and objective scholarship becomes difficult to maintain," appearing "increasingly like one of nuance—a question of who can appear less obvious, or more subtle, in her rhetoric."<sup>56</sup> This sounds like, but was not, a defense of purely political scholarship. For they went on to say that in practice, objectivity is less an epistemological position than a demand for "something a bit more humble—such as fairness and credibility."<sup>57</sup> They agreed with Mohr's vision of the moral responsibilities of good scholarship, including a vision of truth which embodies complexity, ambiguity and paradox. In particular, they said, the scholar should allow "truths that conflict with one's politics to enter into and shape the conclusions of one's work."<sup>58</sup> Nevertheless, they continued, historians must be prepared to translate their views into the cruder language of politics when they enter public debate—including, it would seem, when entering the courthouse.<sup>59</sup>

One of the most striking aspects of the historians' brief was the enormous credibility it obtained from the public, including abortion opponents.<sup>60</sup> That public reception was presumably based on a perception that the brief was not merely special pleading but had some kind of objective credibility.

## II. Putting "Truth" on Trial

Although doubts about the meaning and even existence of objectivity are highlighted when historians enter the arena of the courtroom, the issues are obviously much broader and more fundamental. For the lawyer, the question is whether the litigation process can claim the goal of establishing truth. For the historian, the question is

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55. Larson & Spillenger, *supra* note 51, at 37.

56. *See id.* at 38.

57. *See id.*

58. *Id.* at 39.

59. *See id.* at 43.

60. *See id.* at 40 n.19 (citing George Will, a noted conservative columnist, who accepted the brief's historical account).

whether scholarship can be distinguished from advocacy, or objectivity from ideology. I begin by considering some wholesale recent attacks by legal scholars on the concept of objective truth, before returning to the issue of objectivity in historical research.

### A. The Postmodern Challenge

Challenges to the concept of objectivity span the disciplines. Among legal scholars, the attack on objectivity stems from members of three interlinked groups: critical legal scholars, critical race theorists, and radical feminists.<sup>61</sup> Gary Peller, a leading critical legal scholar, has explained that broader attacks on current social standards are grounded on the "critique of objectivity and liberal notions of knowledge pressed by radical feminists and critical race theorists."<sup>62</sup> Generally speaking, this critique associates objectivity with structures of social oppression.

Among radical feminists, objectivity is sometimes seen as part of the apparatus maintaining the subordination of women. While avowing to be neutral and universal, they argue, objectivity in fact embodies the male perspective. For example, Catharine MacKinnon disavows what she calls "standard scientific norms."<sup>63</sup> She explains that the radical feminist critique of "the objective standpoint as male" is necessarily "a critique of science as a specifically male approach to knowledge."<sup>64</sup> To look at women objectively is to objectify them, to treat them as objects. More generally, "[o]bjectivity is the epistemological stance of which objectification is the social process . . . . That is, to look at the world objectively is to objectify it."<sup>65</sup>

Radical feminists have called for a repudiation of the ideals of objectivism and rationalism propounded by traditional scholars.<sup>66</sup>

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61. For an overview and critique, see DANIEL FARBER & SUZANNA SHERRY, *BEYOND ALL REASON: THE RADICAL ATTACK ON TRUTH IN LAW* (1997).

62. See Gary Peller, *The Discourse of Constitutional Degradation*, 81 GEO. L.J. 313, 339 (1992).

63. See CATHARINE A. MACKINNON, *FEMINISM UNMODIFIED: DISCOURSES ON LIFE AND LAW* 54 (1987).

64. See *id.*

65. *Id.* at 50.

66. See Susan H. Williams, *Feminist Legal Epistemology*, 8 BERKELEY WOMEN'S L.J. 63, 71 (1993). For a discussion of the epistemological issues by a feminist male scholar, see Peter Halewood, *White Men Can't Jump: Critical Epistemologies, Embodiment, and the Praxis of Legal Scholarship*, 7 YALE J.L. & FEMINISM 1 (1995). He suggests that male scholars should retract their views whenever feminist women disagree. See *id.* at 25. For

For example, in critiquing traditional legal pedagogy, Linda Hirshman attacks the current "orthodoxy about what counts as knowledge" because it "enshrine[s] a private order of male dominance."<sup>67</sup> Similarly, Lucinda Finley contends that "objective thinking is male language," as are "[r]ationality, abstraction, [and] a preference for statistical and empirical proofs over experiential or anecdotal evidence."<sup>68</sup> Although addressed at scholarship, historical or otherwise, this position has obvious implications about claims that objective truth is the goal of trials.

For some minority scholars, a similar critique of conventional rationality is rooted in multiculturalism. Gary Peller explains the rejection of objectivism by black nationalist scholars:

In general, the radical critique launched by black nationalist sociologists and cultural critics claimed that objective reason or knowledge could not exist, because one's position in the social structure of race relations influenced what one would call "knowledge" or "rationality." The cultural differences between blacks and whites could not be studied through a neutral frame of reference, because any frame of reference assumed the perspective of either the oppressed or the oppressor, either African Americans or whites, either the sociologist or the subject. . . . There could be no neutral theory of knowledge—knowledge was itself a function of the ability of the powerful to impose their own views, to differentiate between knowledge and myth, reason and emotion, and objectivity and subjectivity.<sup>69</sup>

Others have taken the attack further by challenging not merely truth, but the entire normative structure of current society.<sup>70</sup>

The erosion of the concept of objectivity opens the door for what would previously have been considered unduly subjective approaches to scholarship. Methodologically, the rejection of traditional con-

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a more recent epistemological debate, see Susan Hekman's *Truth and Method: Feminist Standpoint Theory Revisited*, 22 SIGNS 341 (1997), along with the rejoinders in the same issue by other feminist scholars.

67. See Linda R. Hirshman, *Foreword: The Waning of the Middle Age*, 69 CHI.-KENT L. REV. 293, 297-98 (1993).

68. See Lucinda M. Finley, *Breaking Women's Silence in Law: The Dilemma of the Gendered Nature of Legal Reasoning*, 64 NOTRE DAME L. REV. 886, 893 (1989).

69. Gary Peller, *Race Consciousness*, 1990 DUKE L.J. 758, 806.

70. According to Richard Delgado, a leading critical race theorist, "[n]ormative orderings always reflect the views of the powerful"; hence, "one cannot use categories like justice, equality, etc., to overturn the very system" that created those values. See Richard Delgado, *Norms and Normal Science: Toward a Critique of Normativity in Legal Thought*, 139 U. PA. L. REV. 933, 951, 961 (1991).

cepts has led to a novel technique in scholarship: the presentation of stories based on personal experience. By 1989, legal storytelling had risen to such prominence that it warranted a symposium in a major law review.<sup>71</sup> A classic example is Patricia Williams' "Benetton" story about how she was refused admission to a store for (she believes) racial reasons, and the difficulties she encountered in persuading a law review to publish her unsupported account of this episode.<sup>72</sup> Use of narrative or case studies is hardly new to scholarship, whether historical or legal. But the legal storytellers value only "stories from the bottom" about oppression.<sup>73</sup> They de-emphasize traditional analytic methods, seem relatively unconcerned about whether stories are either typical or descriptively accurate, and emphasize the aesthetic and emotional dimensions of narration.<sup>74</sup>

The tension between legal storytelling and traditional concepts of objectivity can be seen in the writings of some of its most thoughtful advocates. Discussing narratives that are presented as factual, Kathryn Abrams finds it untroubling if these narratives were to turn out "not [to] track the life experiences of their narrators in all particulars" or to be composites of multiple events.<sup>75</sup> After all, she points out, creating a narrative inevitably involves a process of selection and modification.<sup>76</sup> Jane Baron questions the continuing, if ambivalent, attachment of storytellers to the traditional concept of an objective reality, a concept she believes to be at odds with the implications of their methodology.<sup>77</sup> Another defender of legal storytelling, Bill Eskridge, suggests that building community among the oppressed—not discovering objective truth—may be the highest goal of legal scholarship.<sup>78</sup> None of this fits readily with the conventional views of the nature or goals of scholarship.

Legal storytelling is essentially testimony offered without the possibility of impeachment, cross-examination, or contradiction by

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71. See Symposium, *Legal Storytelling*, 87 MICH. L. REV. 2073 (1989).

72. See PATRICIA WILLIAMS, *THE ALCHEMY OF RACE AND RIGHTS* 44-51 (1991).

73. FARBER & SHERRY, *supra* note 61, at 38-40.

74. *Id.*

75. See Kathryn Abrams, *Hearing the Call of Stories*, 79 CAL. L. REV. 971, 1025 (1991).

76. See *id.* at 1026.

77. See Jane B. Baron, *Resistance to Stories*, 67 S. CAL. L. REV. 255 (1994). For a more recent discussion, see Jane B. Baron & Julie Epstein, *Is Law Narrative?*, 45 BUFF. L. REV. 141, 183-84, 186 (1997).

78. See William N. Eskridge, Jr., *Gaylegal Narratives*, 46 STAN. L. REV. 607, 625 (1994).

other witnesses, seeking to be credited based on the narrator's status as a representative of the oppressed. If this methodology is valid in legal scholarship, similar issues may arise about how historians should handle their own source materials—in particular, whether the stories of the oppressed should be given unquestioned priority over other historical materials. Similarly, the traditional methods of trial might be called into question on the theory that they fail to give sufficient credence to certain perspectives.

The connection between these critiques of legal scholarship and the study of history has not escaped legal scholars. Kim Lane Scheppele observes that historical reconstruction, like that taking place in courts, often proceeds from narrative evidence, and even physical evidence makes sense primarily in the context of narratives.<sup>79</sup> What “passes for fact, both in historical research and in courts of law,” is a narrative that provides a “sense of faithfulness” to the documentary narratives on which it is based.<sup>80</sup> Apparently, the best for which one can hope is to “credibly claim to be constructing a narrative of evidence one has not invented out of one's imagination.”<sup>81</sup> Not everything goes—“it is crucially important to screen out lies”—but reality comes in multiple, and very different, versions.<sup>82</sup>

Something remains of the concept of objectivity here, but perhaps not much: apparently a narrative need only be sincere (and so not a “lie”<sup>83</sup>) and nonhallucinatory (and so “not invented out of one's imagination”<sup>84</sup>). Perhaps this is the most that the historian or the court can ask of their findings, but if so, neither can claim to speak with much authority. But perhaps that is precisely the point.

## B. Historians and the Question of Objectivity

Like legal scholars, historians have hotly debated the concept of objectivity, a debate that is carefully traced by Peter Novick in a 1988 book, *That Noble Dream*.<sup>85</sup> Although Novick begins his story much

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79. See Kim Lane Scheppele, *Just the Facts, Ma'am: Sexualized Violence, Evidentiary Habits, and the Revision of Truth*, 37 N.Y.L. SCH. L. REV. 123, 163 (1992).

80. See *id.*

81. See *id.*

82. See *id.* at 164. Thus, facts are “hardly neutral or natural,” and “much misogynistic work is done in the construction of ‘reality’.” See *id.* at 125-26.

83. See *id.*

84. See *id.* at 163.

85. NOVICK, *supra* note 31. For a more recent overview of the debates over histori-



earlier, we may usefully start with the 1960s when some black historians (like the black scholars discussed by Peller) advanced the claim of a unique perspective.<sup>86</sup> Novick reports that feminist scholars have also provided support for an "unabashedly perspectival" approach, as they have in law.<sup>87</sup> But influences from outside the academic discipline of history were also important. Geertz and other anthropologists promoted an influential relativist viewpoint.<sup>88</sup> (Indeed, even today, anthropologists debate whether witchcraft can be considered irrational under some cross-cultural standard.<sup>89</sup>) Another influence on historians was Foucault, who saw science as propelled by hegemony<sup>90</sup> and whose philosophical views "historicized and relativized any stable truth claims."<sup>91</sup> Finally, as other commentators have pointed out, the influence of Derrida also reinforced this trend toward questioning the possibility of objectively representing reality.<sup>92</sup>

For some postmodernists, history seems to collapse into the study of how historians create texts from other texts.<sup>93</sup> Today, postmodernists often put the word reality in quotes as an ironic statement,<sup>94</sup> while science is considered only an elaborate dominance game to ensure Western power.<sup>95</sup> Although the details have varied from discipline to discipline, this story is familiar to many legal scholars, social scientists, and humanities professors. Postmodernism is a ubiquitous intellectual presence, even if it sometimes reaches outlying disciplines, such as law, only in simplistic form.

Novick is generally content to provide the details of this history without editorial comment. In the book's introductory section, however, he does provide a glimpse of his own views. He contends that the objectivity concept "promotes an unreal and misleading distinction between, on the one hand, historical accounts 'distorted' by

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cal objectivity, see Joyce Appleby, *The Power of History*, 103 AM. HIST. REV. 1 (Feb. 1998).

86. See NOVICK, *supra* note 31, at 490-91.

87. See *id.* at 596.

88. See *id.* at 551-52.

89. See *id.* at 550.

90. See JOYCE APPLEBY ET AL., *TELLING THE TRUTH ABOUT HISTORY* 203 (1994). Foucault's own historical methods were slapdash by conventional standards. See RICHARD HAMILTON, *THE SOCIAL MISCONSTRUCTION OF REALITY* 171-96 (1996).

91. See APPLEBY ET AL., *supra* note 90, at 235-36.

92. See *id.* at 208.

93. See *id.* at 227.

94. See *id.* at 204.

95. See NOVICK, *supra* note 31, at 8.

ideological assumptions and purposes; on the other hand, history free of these traits.”<sup>96</sup> Yet, he agrees that professional methods can matter more than ideology in at least some historical controversies, so he is not a complete relativist.<sup>97</sup> The book itself is a model of careful conventional historical research. As one commentator put it, in Novick’s “wide-ranging, ironic, dispassionate—indeed, in several senses of the term *objective*—account of the American historical profession, he calls into question precisely those notions of objectivity that lie hidden in the idea that there is a ‘full story.’”<sup>98</sup>

In response to his critics, Novick later attempted to clarify his views in a paper with the charming title, “My Correct Views on Everything.”<sup>99</sup> He considers relativism as less a position in its own right than a rejection of objectivism.<sup>100</sup> He also does not view the dispute about objectivity as having any methodological significance:

If two historians, one a ‘nihilist relativist’ and the other a dyed-in-the-wool objectivist, set out to produce a history of the Civil War, or a biography of George Washington, there is nothing about their ‘relativism’ or ‘objectivism’ per se that would lead them to do their research differently, frame their narrative or analysis differently, or, indeed, prevent their writing *identical* accounts.<sup>101</sup>

What, then, is at stake is the understanding of the historian’s function? Are historians engaged in offering new ways of looking at the past, or should they aspire to a “higher office”—seeking a definitive account?<sup>102</sup>

Novick may have been overly sanguine in stating that nothing methodological is at stake here. He admitted to being more tolerant of factual errors than the conventional historian, believing that “an argument can possess ‘relative autonomy . . . from details of the evidence.’”<sup>103</sup> For this reason, he expressed sympathy with a graduate student who was essentially hounded out of the profession because of numerous (but probably unintentional) errors in his archival research

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96. See *id.* at 6.

97. See *id.* at 10 (using the example of the profitability of slavery in the American South).

98. See Allan Megill, *AHR Forum: Fragmentation and the Future of Historiography*, 96 AM. HIST. REV. 693, 695 (1991).

99. See *id.* at 699.

100. See *id.*

101. See *id.* at 700.

102. *Id.* at 702.

103. See *id.* at 701.

on the Weimar republic.<sup>104</sup> This nonchalant attitude toward historical accuracy is reminiscent of the views of the storytelling advocates in law, although narrative is apparently considered a conservative rather than radical form in history.<sup>105</sup>

The ontological question may also have important implications for how historians address each other's work. As Novick is well aware, not all his fellow anti-objectivists share his tolerant pluralism.<sup>106</sup> As shown by the experiences of historians as expert witnesses, disputes about controversial historical questions spill over into arguments about ideological motivation and methodological shortcomings. The Rosenberg affair also suggests the possibility that anti-objectivism can function as an excuse to exert pressure against those with unpopular views.

In reviewing the anti-objectivist literature, it is important not to exaggerate. Among historians, attacks on the concept of objectivity can be easily found. Efforts to "problematize" factuality and reality are also easy to locate; sometimes these efforts are successful to the point of leaving the neophyte reader entirely unsure of the author's conclusions. Nevertheless, objectivity remains an important aspect of how most historians approach their own work. Historians are unlikely to abandon entirely their belief in the integrity of the evidence with which they work. After all, if they abandoned *altogether* the notion that evidence of the past has some claim to authority, historians would have no recourse but to join the already overcrowded and often underpaid ranks of fiction writers. The risk is not a final divorce between the historian and truth, but a series of infidelities. But this is not a negligible risk.

As is often true, then, what is really at stake in these debates is a matter of degree. It is nonetheless an important matter of degree. To the extent that we blur the distinctions between history and fiction, or between evidence and political testimonials, we may change the nature of the discourse within the relevant professional communities. We may also change the way in which those outside of the historical community view its work. As Novick puts it, "[f]rom the

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104. NOVICK, *supra* note 31, at 613-21.

105. See APPLEBY ET AL., *supra* note 90, at 231-32. It would be a mistake, however, to reduce the objectivity debate to purely ideological terms. Consider, for example, the defense of objective scholarship by a leading Marxist historian. See Michael Bess, *E.P. Thompson: The Historian as Activist*, 98 AM. HIST. REV. 19, 29-33 (1993).

106. See NOVICK, *supra* note 31, at 702-03.

reader's point of view, it's a question of the sort of object they hold in their hands when they pick up a work of history."<sup>107</sup> This is an important question for many readers, not least of them the judge who is confronted with a historian's testimony.

### III. Objectivity as Value and Process

Regardless of how we define objectivity and characterize the "reality" of the past, the fundamental question remains: with what attitude should we approach inquiry into past events?

At first sight, the dispute over objectivity seems epistemological, that is, to relate to whether and how it is possible to have true knowledge about the past. At least among historians, however, this does not seem to be the crux of the debate. Even the most postmodern of historians still admit the existence of some knowable objective facts—for example, that the Holocaust took place.<sup>108</sup> On the other hand, even the greatest believer in objective historical truth must admit that there are limits to historical knowledge. As a practical matter, there are some events whose true facts will forever remain debatable because of the ambiguities in the historical record, and some facts whose import will always be subject to conflicting interpretations. Thus, everyone seems to agree that it is possible to "know" some things about the past, and that there are other things that cannot be definitively resolved.

Although postmodernists sometimes speak in such terms, it also seems to me that the debate cannot be reasonably construed to concern either ontology (is the past "real"?) or semantics (do historical texts actually "refer" to past events?). As to the ontology question, the reasons for questioning the reality of the past seem no better than those for questioning anything else that cannot be currently observed. As to the semantic question, although the whole question of how words manage to relate to things is full of philosophical mysteries, they seem no more profound for past events than current ones. In short, assuming that Bill Clinton is "real" (though I have never seen him) and that my use of his name successfully "refers" to a particular human being, there seems no reason to reach any contrary conclusions about past figures such as Richard Nixon (whom I also

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107. *Id.* at 700.

108. See ROBERT F. BERKHOFFER, JR., *BEYOND THE GREAT STORY: HISTORY AS TEXT AND DISCOURSE* 49 (1995); HAYDEN WHITE, *THE CONTENT OF THE FORM: NARRATIVE DISCOURSE AND HISTORICAL REPRESENTATION* 76-77 (1987).

never met) or Franklin Roosevelt (who died before I was born).

Thus, it seems to me, the fundamental dispute is not over the nature of history but over the nature of historians—more specifically, over the kinds of norms that should govern their work. One post-modern historian summarizes the existing norms as follows:

Although the very subject matter of history is value loaded, historians try to construct their histories to be independent of their own most cherished values or those of their value-loaded sources and subject matter. Biased histories are condemned as propaganda because they support or advocate an ideological position or are “present-minded” in their interpretations of the past.<sup>109</sup>

In short, it is important for the traditional historian to open the possibility that the past might not suit her preconceptions, political or otherwise, as opposed to exploiting the past as raw material to bolster a preexisting political position. The postmodernist questions this stance. As Hayden White says, “[f]or subordinate, emergent, or resisting social groups, this recommendation—that they view history with the kind of ‘objectivity,’ ‘modesty,’ ‘realism,’ and ‘social responsibility’ that has characterized historical studies since their establishment as a professional discipline—can only appear as another aspect of the ideology they are indentured to oppose.”<sup>110</sup>

The fundamental question, then, seems to be an ethical or political one: to what extent is this attitude of “objectivity” desirable? This question is independent of issues of epistemology or ontology: even if an objective truth about the past exists, it might be morally best for historians to have other goals; even if no objective truth exists, it might be morally best for historians to maintain a respectful and nonexploitative attitude toward their materials. In this section, I will explore this normative question about historians, with respect to both their usual scholarly work and their occasional role in litigation.

### A. Taking the Past Seriously

The debate about historical objectivity provides three powerful arguments for the objectivity norm. By this I mean not only the knowledge of brute facts—“Elvis is dead,” in terms of the epigraph to this Article—but also the possibility of understanding and interpreting past events in a meaningful way. (For instance: “Elvis adopted

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109. BERKHOFER, *supra* note 108, at 139.

110. WHITE, *supra* note 108, at 81.

black musical styles.”)

The first reason for taking the past seriously is the continuing power it exerts in the present. One form of this power is concrete: the ability of the past to provide new evidence, which can upset our conclusions. This power has been emphasized by Charles Nesson in evidence law,<sup>111</sup> and by historians who note the possibility that additional evidence can always turn up to confound one's thesis:

What stays on visibly in the present are the physical traces from past living—the materials or objects that historians turn into evidence when they begin asking questions. . . . Some of this physical residue lies forgotten, but close enough to the surface of life to be unexpectedly happened upon. Then like hastily buried treasure or poorly planned land mines they deliver great surprises. . . . The past cannot impose its truths upon the historian, but because the past is constantly generating its own material remains, it can and does constrain those who seek to find out what once took place.<sup>112</sup>

The best way to guard against this possibility is to produce interpretations that have the best chance of corresponding to any new evidence that might arise.

Indeed, the need to guard against this kind of “surprise” may be even more pressing in the judicial setting than in scholarship. As one commentator explains, “[b]ecause the judgments of courts (when tackling conventional legal questions) acquire greater fixity than those of historians, it is that much more embarrassing for judges—and threatening to the law's legitimacy—when judicial decisions embodying historical interpretations fail to stand ‘the test of time.’”<sup>113</sup> Thus, “[b]ecause our expectations of closure are greater, we are more disappointed when they are frustrated.”<sup>114</sup> The need to guard against surprises seems especially great in the context of the more important and publicized cases. Thus, in trials with historical significance, when newly discovered evidence results in a pardon or new trial—as it did in some trials for mass murders by government officials in Germany,

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111. See Charles Nesson, *The Evidence Or the Event? On Judicial Proof and the Acceptability of Verdicts*, 98 HARV. L. REV. 1357, 1372-75 (1985). However, Nesson arguably drew the wrong conclusion from this observation. See Roger Park, *The Hearsay Rule and the Stability of Verdicts: A Response to Professor Nesson*, 70 MINN. L. REV. 1057 (1986).

112. APPLEBY ET AL., *supra* note 90, at 255.

113. Mark J. Osiel, *Ever Again: Legal Remembrance of Administrative Massacre*, 144 U. PA. L. REV. 463, 630 (1995).

114. *Id.*

Japan, and Argentina—the public perception is of a “political repudiation of a judicial foray into historiography and national narrative.”<sup>115</sup> The possibility of new evidence provides an incentive for thoroughness and objectivity.

The past also exerts power in the present as the hidden cause of current views and institutions. As Martha Nussbaum argued in connection with her testimony in the *Romer* case, plumbing the past may help provide us with emancipatory possibilities in the present<sup>116</sup>—but only, of course, if we correctly understand the past and its grip on the present. For example, knowing that some same-sex relationships were sanctioned by the medieval church may make gay marriage seem more imaginable as a social policy today.<sup>117</sup>

We must attend to the past carefully, then, much as we attend to our own memories. Indeed, as with memories, one risk is that if we shut off the past, we diminish our own selves in the present. As Ian Hacking states, in discussing the suppression of memories of childhood abuse, “[w]e desperately need Aristotle’s awareness that if I misrepresent my past it matters to my sense of who I am and what I am doing. It matters to how I live and how I feel about my life.”<sup>118</sup> Thus, for example, one element in the definition of fundamental constitutional rights has been the “traditions of our people,” a recognition that our present values gain vitality from their linkage with the past.<sup>119</sup> It was this linkage that motivated the historians’ brief in the abortion case.

The linkage between past and present is especially central in law. A famous maxim by Holmes declares that the life of the law is not logic but experience.<sup>120</sup> In this respect, Holmes was echoing the historical school of jurisprudence, which stressed the connection between law and collective experience.<sup>121</sup> Jurists such as Savigny were

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115. See *id.* at 631.

116. See Nussbaum, *supra* note 21, at 1597-1601. See also Robert Gordon, *The Past as Social Criteria: Stabilizing and Destabilizing Functions of History in Legal Argument*, in *THE HISTORIC TURN IN HUMAN SCIENCES* 339, 359-63 (Terrence J. McDonald ed., 1996).

117. See generally WILLIAM ESKRIDGE, *THE CASE FOR SAME SEX MARRIAGE: FROM SEXUAL LIBERTY TO CIVILIZED COMMITMENT* (1996).

118. Ian Hacking, *Aristotle Meets Incest—and Innocence*, in *QUESTIONS OF EVIDENCE*, *supra* note 2, at 477.

119. See *Washington v. Gluckesberg*, 117 S. Ct. 2258, 2260-68 (1997).

120. OLIVER W. HOLMES, *THE COMMON LAW* 1 (1891).

121. See Harold J. Berman, *Toward an Integrative Jurisprudence: Politics, Morality, History*, 76 CAL. L. REV. 779, 789-92 (1988).

influenced by Burke's "conception of the nation as a partnership of the generations in time"; both Savigny and Burke "considered law to be an integral part of the common consciousness of the nation."<sup>122</sup> Similarly, the Fourteenth Amendment can only be understood as a simultaneous repudiation of some traditions (represented by *Dred Scott*) and a revitalization of others (represented by the Declaration of Independence).<sup>123</sup> Without this rooting in history, legal interpretation can become unmoored.<sup>124</sup> Thus, the claims of the past loom especially large in legal and constitutional history.

A final reason to look unblinkingly at the past relates to moral responsibility. To confront the past is the first step in taking responsibility for it and for the present. It is no coincidence that one step in the collapse of totalitarian regimes has been the recovery of suppressed histories.<sup>125</sup> In these circumstances, historical objectivity can be profoundly liberating, while the doctrine of the social construction of reality can mask political tyranny.<sup>126</sup> As Milan Kundera has said, "the struggle of a people against power is the struggle of memory against forgetting."<sup>127</sup>

For all these reasons, it would be a mistake to abandon the goal of objectivity. There are limits, however, to the degree of objective truth we can expect to attain. When we seek to interpret documents, ascribe causes, assign probabilities, or reconstruct cultures, we become involved in a complex web of fact and theory, making the establishment of a definitive answer more problematic.<sup>128</sup> For instance, the question of whether a group of Native Americans constitutes a

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122. See *id.* at 789. For further discussion of the historical school, see William Ewald, *Comparative Jurisprudence (I): What Was it Like to Try a Rat?*, 143 U. PA. L. REV. 1889, 2004-42 (1995).

123. See DANIEL FARBER & SUZANNA SHERRY, *A HISTORY OF THE AMERICAN CONSTITUTION* (1989).

124. Historical jurisprudence emphasizes the relationship between law and tradition, but while this relationship is always important, it may be one of rejection rather than acceptance. For instance, German legal thinkers explicitly connect important constitutional rulings with the specific need of Germany to repudiate the inheritance of the Third Reich. See Berman, *supra* note 121, at 791 & n.30.

125. See Osiel, *supra* note 113.

126. See Daniel Farber & Suzanna Sherry, *The 200,000 Cards of Dimitri Yurasov: Further Reflections on Scholarship and Truth*, 46 STAN. L. REV. 647, 654-55, 661-62 (1994).

127. See APPLEBY ET AL., *supra* note 90, at 270.

128. Mark Kelman makes this point regarding past ascriptions of probability. See Mark Kelman, *A Rejoinder to Cass Sunstein*, in *QUESTIONS OF EVIDENCE*, *supra* note 2, at 200.



"tribe" is not just a question about the occurrence of past events but about how those events should be characterized legally, a determination that involves profound (and conflicting) cultural norms.<sup>129</sup> The same is true when we are attempting to reconstruct the collective intentions of past authors or actors. After all, intent (particularly collective intent) is as much a construct as a fact.<sup>130</sup>

### B. Truth and the Purpose of Litigation

The values served by this kind of commitment to objectivity are illustrated by the Chippewa case with which we began. Taking seriously the history of the Chippewa and their nineteenth century interactions with whites is a way of respecting them; unsentimentally attempting to reconstruct their views gives them a voice and their descendants a chance to vindicate their rights. It is also a way in which the non-Native American majority can take moral responsibility for the painful history of the conquest and its aftermath. Still, we must acknowledge that the original participants can no longer be interrogated; moreover, their culture has been irremediably changed over the course of 150 years, making their original culture partially inaccessible today even to their descendants. When we seek to reconstruct their views we must speak with humility, knowing that an irreducible element of mystery may remain. That is also a way of respecting them and taking responsibility for our own role in partially erasing their culture and history.

In using the Chippewa case as an example of taking history seriously, I am assuming that the judicial system, like the historian, should have the goal of seeking the truth about the past. Whether the historian's objectivity—or lack thereof—is important in the trial context thus depends on a broader question: whether the primary purpose of the trial is to establish the truth or instead to achieve some other social goal.

The assumption that the trial's purpose is finding the truth will not startle evidence scholars. Postmodernism so far has had only a

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129. See Gerald Torres & Kathryn Milun, *Translating Yonnonidio by Precedent and Evidence: The Mashpee Indiana Case*, 1990 DUKE L.J. 625.

130. This is a major theme of the voluminous literature on legislative intent in the statutory realm and original intent in the constitutional realm. See DANIEL FARBER & PHILIP FRICKEY, *LAW AND PUBLIC CHOICE: A CRITICAL INTRODUCTION* (1991) (statutory interpretation); FARBER & SHERRY, *supra* note 123, at 373-97.

small presence in evidence law.<sup>131</sup> As Twining has pointed out, the overwhelming tradition is one of rationalism and empiricism.<sup>132</sup> Indeed, as he puts it, the tradition is "remarkably unskeptical [philosophically] in respect of its basic assumptions,"<sup>133</sup> although some dissenting voices are now beginning to emerge.<sup>134</sup>

Quite apart from such skeptical or relativist philosophical views, however, some notable scholars argue that the goal of the trial should be something besides identifying truth. One view is that the trial is primarily a form of theater designed to serve various social purposes.<sup>135</sup> Another view is that the verdict's actual truth is less important than its acceptance by the public as a version of past events.<sup>136</sup> While these theories do not reject the possibility of objective truth, they marginalize it as a goal of adjudication. Although at this point I am prepared to make only a preliminary assessment of these theories, I do not find them normatively attractive.

Kenneth Graham presents the theatrical perspective on trials. He castigates inductive logic as a tool of government power, and views trials as exercises of theater rather than fact-finding. "If we understand that a trial is no more rational than a Presidential election," he says, "scholars as well as lawyers can learn from the uses to which evidence, science, and art are put by those who stage our electoral extravaganzas."<sup>137</sup> It would be fruitless to deny the existence of a theatrical element in trials. Suffice it to say, however, that recent Presidential elections do not seem a promising source of inspiration for improving the trial process. Moreover, by undermining concern about whatever had actually happened outside of the courtroom (we are just presenting a drama, after all), Graham's theory conspicu-

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131. See Roger Park, *Evidence Scholarship, Old and New*, 75 MINN. L. REV. 849, 849-50 (1991).

132. See TWINING, *supra* note 2, at 71-81.

133. See *id.* at 75. Bentham and Wigmore are the paradigm examples. See *id.* at 38-40, 59-61.

134. See *id.* at 76, 110-111. For a more recent example, see Naomi R. Cahn, *Inconsistent Stories*, 81 GEO. L.J. 2475, 2521 (1993) (whether testimony is true or false is an interpretative act); see also *id.* at 2477-78 (finding it unproblematic for different stories to contradict each other). But as Twining points out, the view that truth is merely socially constructed has little appeal in this context, where it would block claims that the result of a trial was ever factually wrong. See TWINING, *supra* note 2, at 116, 261 n.148.

135. See Kenneth W. Graham, Jr., "There'll Always Be An England": *The Instrumental Ideology of Evidence*, 85 MICH. L. REV. 1204, 1233-34 (1987).

136. See Nesson, *supra* note 111.

137. See Graham, *supra* note 135, at 1233-34.

ously fails to treat the past with respect. In the Chippewa case, for example, it suggests that we should be indifferent to the actual treatment of the Chippewa in the nineteenth century; the only question is whether the tribe or the state government can put on a more riveting show in the courtroom today.<sup>138</sup>

The public acceptability approach is more nuanced, though it also highlights public appraisal of the trial rather than the ascertainment of truth. Charles Nesson maintains that the public needs to be convinced that trial outcomes are tied to actual events rather than being statements about the weight of the evidence at the trial.<sup>139</sup> From this premise, he draws the conclusion that the verdict should be based, or at least should appear to be based, on acceptance of a specific story about the events. For this reason, we should be willing to approve civil verdicts even if they are probably false, so long as no single opposing story is more credible than the verdict.<sup>140</sup> Unlike Graham's theory, Nesson's theory does not cut off concern about past events entirely, but it more subtly distorts appraisal of the past. In order to create the public appearance of fidelity to the past, the acceptability theory is willing to sacrifice the actual fidelity of the verdict to the past. For this reason, the theory has been rejected by the majority of evidence scholars.<sup>141</sup>

A recent article by Mark Osiel explores the tension between truth-finding and the "symbolic" functions of trials.<sup>142</sup> Osiel provides detailed case studies of Nuremberg and other criminal trials of government leaders. His examples include the Japanese war crime trials after World War II, the Eichman trial in Jerusalem, the Klaus Barbie case in France, and Argentinean trials of military officers for mass murder. Osiel believes that such trials can play a valuable role in fostering public discussion,<sup>143</sup> but worries that efforts to exploit the trials for their dramatic potential are inconsistent with due process: "What makes for a good 'morality play' does not necessarily make for a fair

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138. The history of the term "show trial" suggests that the vision of trial-as-theater is not, in the end, a favorable one for defendants or the public.

139. Apparently, that is, when a defendant is acquitted, the public is supposed to think he is innocent, not merely that the government failed to prove its case.

140. See Nesson, *supra* note 111, at 1389.

141. See Michael L. Seigel, *A Pragmatic Critique of Modern Evidence Scholarship*, 88 NW. L. REV. 995, 1005 (1994).

142. See Osiel, *supra* note 113.

143. See *id.* at 498-99.

trial.”<sup>144</sup> Thus, he says, it is a key question “whether collective memory may be purchased only at the exorbitant price of fairness to individual defendants.”<sup>145</sup> He concludes ultimately that properly conducted trials of government leaders can serve an important educational function. He argues, however, that their proper function is to stimulate public discourse rather than inculcate specific lessons, and that serving this function is consistent with fairness to defendants.<sup>146</sup> While conventional evidence scholarship has recognized the multiple purposes of trial, it is difficult to see how we can abandon the truth-finding function without fatally compromising the concept of due process.

If the trial is to serve as a forum for the pursuit of truth regarding past events, certain kinds of institutional conditions are required to ensure that all the evidence is considered and that possible sources of bias or error are exposed. These institutional conditions are embodied in evidence law, rules of procedure, and standards of legal ethics.

Similarly, certain kinds of institutional conditions are required to underwrite the historian’s testimony. Joyce Appleby and her co-authors have written about the role of professional practices in making objective knowledge possible. They claim that because inquiry is an essentially social activity, the “system of peer review, open refereeing, public disputation, replicated experiments, and documented research—all aided by international communication and the extended freedom from censorship—makes objective knowledge possible.”<sup>147</sup>

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144. See *id.* at 505.

145. See *id.* at 510.

146. See *id.* at 700-04.

147. APPLEBY ET AL., *supra* note 90, at 281. Appleby’s view has close affinities with John Dewey’s conception of democracy. Democracy, for Dewey, offered the only possibility for the full application of human intelligence to understanding the world, because only democratic institutions offer the full potential for criticism, experimentation, and free debate. Unless institutions are truly democratic, open, and inclusive, they risk excluding relevant insights from the debate. See Daniel Farber, *Reinventing Brandeis: Legal Pragmatism for the Twenty-First Century*, 1995 U. ILL. L. REV. 163, 186 (1995). On the status of “facts” in pragmatist thought, see BRIAN Z. TAMANAHA, *REALISTIC SOCIO-LEGAL THEORY: PRAGMATISM AND A SOCIAL THEORY OF LAW* 50-55 (1997). Thus, the notion of objectivity need not rest on the kind of essentialist “realism” popular among some conservatives. See Fred Matthews, *The Attack on “Historicism”: Allan Bloom’s Indictment of Contemporary American Historical Scholarship*, 95 AM. HIST. REV. 429 (1990).

Interestingly enough, the Supreme Court has identified somewhat similar criteria as the foundation for the presentation of scientific testimony.<sup>148</sup> In deciding whether to admit expert testimony, the trial judge is supposed to determine whether the evidence is based on the scientific method.<sup>149</sup> This determination is to be based on several factors, including the following:

1. Whether the theory has been tested.<sup>150</sup>
2. Whether it has been subject to peer review and publication.
3. The general acceptance of the theory in the scientific community.<sup>151</sup>

The Court also stressed the availability of vigorous cross-examination and presentation of contrary evidence as ways to prevent undue reliance on shaky scientific evidence.<sup>152</sup> In short, the willingness to submit evidence to open debate and testing, both in the courtroom and in the scientific community, is central to establishing its reliability. Although the *Daubert* test may not directly apply to the testimony of historians,<sup>153</sup> it dovetails well with the conditions that Appleby and others have identified for the development of genuine historical truth.

The greatest threat to the development of such truth may not be theories of relativism, but rather social impediments to free inquiry.

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148. See *Daubert v. Merrell Dow Pharmaceuticals*, 509 U.S. 579 (1993).

149. See *id.* at 589-90.

150. See *id.* at 593. Admittedly, the Court's discussion of this point seems as much positivist as pragmatist.

151. See *id.* at 594.

152. See *id.* at 596.

153. The application of *Daubert* to historians' testimony is unclear for two reasons. First, the *Daubert* Court was addressing the specific issues posed by "scientific" testimony. Much of what the Court said seems inapplicable to some other kinds of experts, for example, testimony by real estate appraisers. Historians may or may not be "scientists" for this purpose, and if they are not, their testimony is probably subject only to looser admissibility rules. For discussion of the application of *Daubert* to the social sciences, see Edward Imwinkelried, *The Next Step After Daubert: Developing a Similarly Epistemological Approach to Ensuring the Reliability of Nonscientific Expert Testimony*, 15 CARDOZO L. REV. 2271 (1994); Teresa Renaker, Comment, *Evidentiary Legerdemain: Deciding When Daubert Should Apply to Social Science Evidence*, 84 CAL. L. REV. 1657 (1996). Second, as in the abortion case, historians sometimes give their views with regard to an issue of "legislative" rather than "adjudicative" fact—that is, testimony relating to some general issue of social policy rather than the factual dispute in a particular case. Whether given orally or in writing, material pertaining to legislative facts is not subject to the rules of evidence. As the Chippewa case illustrates, however, not all testimony by historians is of this kind.

In this regard, the Rosenberg episode discussed in Part I is particularly worrisome. If historians cannot feel free, both in the courtroom and in scholarly forums, to express their viewpoints freely, their collective claim to speak the truth about the past is imperiled. Academic freedom is a necessary part of the collective search for truth.

### Conclusion

In this paper, using the example of the historian as expert witness, I have attempted to explore at least preliminarily some of the perplexities of the idea of objective truth as applied to the past. It is tempting to brush aside relativist or skeptical theories, postmodern or otherwise. After all, it is difficult to doubt the objective reality of yesterday's bike accident while hobbling on crutches today. But skepticism serves the useful purpose of focusing our attention on our relationship with the past, rather than allowing us to take it for granted. If we ponder the reasons why the past is not just real but important to us, we can gain a deeper understanding of how to design institutions and procedures for investigating the past. The basic answers are familiar, having been worked out in the course of several centuries of evolution toward a free society. It is never a mistake, however, to recall the importance of those preconditions of free inquiry, whether in the academy or the courtroom.

At heart, the postmodernist claim is that abandoning the concept of objectivity will be politically liberating—that, as Hayden White says in the statement quoted earlier, objectivity is a barrier in the path of the downtrodden of the earth.<sup>154</sup> As I have made clear before, I am skeptical of this claim.<sup>155</sup> On the contrary, the first demand of the liberated is for the truth. As Mark Osiel explains:

There is something about large-scale administrative massacre that brings out the residual positivist—sometimes deeply “repressed,” as within postmodernist intellectuals—in virtually everyone. Before there is any debate about who is morally or legally responsible for what, or about which lessons must be learned to prevent the catastrophe's recurrence, people want to know “the facts.” The banners they proclaim through the streets might just as well carry the motto of the nineteenth-century Germany historian, Leopold von Ranke: to discover the past “as it really was”—a view today treated as only

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154. See *supra* note 110 and accompanying text.

155. See Farber & Sherry, *supra* note 126.

the object of ridicule by professional historians.<sup>156</sup>

The moment that the totalitarian shadow is lifted, the demand for historical truth begins. Thus, the "first indispensable reparation demanded by society after fundamental institutions had been restored," according to the Argentine National Commission on the Disappeared, "was to ascertain the truth of what had happened, to 'face up' to the immediate past and let the country judge."<sup>157</sup>

In sum, as Osiel says, "[d]uring democratic transitions, people view the facts—in all their unmediated pretheoretical innocence—as the surest antidote to the flatulent rhetoric, glittering slogans, and radiant abstractions of the authoritarian rulers, recently displaced."<sup>158</sup> The traditional historian and conventional evidence scholar, far from being apologists for an oppressive status quo, can justly claim to represent the forces of liberation, whereas postmodernism can sometimes serve as an evasion of responsibility for oppression.<sup>159</sup>

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156. See Osiel, *supra* note 113, at 670.

157. *Id.* at 670-71.

158. *Id.* at 672.

159. A notable example was the use of postmodernist rhetoric by the defense in the Klaus Barbie case. See ALAIN FINKIELKRAUT, REMEMBERING IN VAIN: THE KLAUS BARBIE TRIAL AND CRIMES AGAINST HUMANITY (Roxanne Lapidus & Sima Godfrey trans., 1992); Guyora Binder, *Representing Nazism: Advocacy and Identity at the Trial of Klaus Barbie*, 98 YALE L.J. 1321 (1989). It seems not entirely unfair to point out that one of the founders of postmodernist philosophy in America spent his entire life concealing his activities as a Nazi collaborator during World War II, and that another founder devoted considerable effort to "deconstructing away" those anti-Semitic activities. See *id.* at 1377-83. Note, incidentally, Hayden White's admission that his preferred perspective on history is "conventionally associated with the ideologies of fascist regimes." See WHITE, *supra* note 108, at 74.